

OFFICIAL

# Approach - 2020-100972

**Complainant****P301175402J Not Given****Case Priority**

6 - Cat 2

**Street Address Case****Caller Phone Details****After Hours Phone****Business Phone****Mobile Phone****Fax****Email****Date of Birth****Organisation**

Phone

**Receipt Details**

File Type:	Investigation-In-Confidence	Received Date:	13-Aug-20 4:16 PM
Case Type:	Non-AFP	Received By:	Witham, Claire
How Received:	Email	Registered Date:	13-Aug-20 4:16 PM
TimeSpent:	0(to date)	Registered By:	Witham, Claire
Owned By:	[REDACTED], Michael	Status:	Closed
Team:	PID and Major Investigation		

**Co Complainant****RoleHolder****Role****Comment**

OMB - Commonwealth Ombudsman

Agency

P301175402J Not Given

Caller

[REDACTED], Daniel

Agency Specialist

[REDACTED], Daniel

Agency SAO

[REDACTED], Michael

Last Action Assigned Officer

**Summary**

Discloser wishes to make a service delivery complaint about our decision to grant an extension to the agency (APSC) in relation to the investigation of their PID.

**ISSUES****Issues****Cause****Outcome****Actions**

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Action	Contact	Assign To	Due Date	Completed By	Completed	Status	Time
<b>Case Ownership Changed</b>	/	Witham, Claire	13-Aug-20 5:03 PM	Witham, Claire	13-Aug-20 5:03 PM		
Assigned to 'Witham, Claire' by 'Witham, Claire'							
<b>New Incoming Document Attached</b>	/	Witham, Claire	14-Aug-20 4:57 PM	Witham, Claire	14-Aug-20 1:31 PM		0
20200813 EMail 01.msg	1. Email from p301175402j with service complaint about OBO granting an extension to APSC						
<b>New Incoming Document Attached</b>	/	Witham, Claire	19-Aug-20 10:56 AM	Witham, Claire	18-Aug-20 11:32 AM		0
20200818 EMail 01.msg	2. Email from discloser regarding timeframe for service complaint						
<b>Briefing</b>	/	Witham, Claire	16-Sep-20 8:28 AM	Witham, Claire	2-Sep-20		0

## FINDINGS TO DATE

Since 18 August 2020, I have reviewed the following documents regarding our obligation to consider the views of the discloser when considering a request for an extension from an agency:

the PID Act

the Agency Guidelines

PID Procedures (internal)

I have been unable to find any obligation on the part of the Office to make direct contact with a discloser in a PID investigation being handled by an external agency to gather their views when the Office is considering granting an extension to that agency.

As far as I can see, we actively encourage agencies to seek the views of the discloser prior to submitting a request from an extension and we ask that they advise us of the discloser's view in their request. However I am advised by the previous PID director and others that there is no known history of the Office making contact with a discloser in a matter being handled by another agency, as I am advised this is not our role.

The discloser in this service complaint has voiced concerns about the Office's failure to consider his views when granting the extension and his perception that our decision to grant the extension lacked rigour.

My research indicates that the general practice of the PID team is to ask clarifying questions of an agency seeking an extension, if it is not clear in the request form (including progress of the investigation, reasons for any lengthy delays). There are more recent examples where PID team members have also, where time permits, held off on making a decision on the extension request until the agency can provide us with information about the discloser's views in relation to the extension request. It appears unlikely that we would interrogate an agency on the details of the progress of their investigation at the point where an

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extension is requested, as this could be viewed as a PID handling complaint procedure.

In general, it appears we accept the information provided by agencies in relation to extension requests on face value.

While the discloser in this matter has voiced concerns about our handling of granting the extension, at this stage I cannot see that Mr Davis made any significant errors in how he handled the request. I note that he made contact with the agency in relation to the comments made in relation to the discloser's views on the extension request form. It may have been preferable if he had sought more information on what was said to the discloser by the agency in relation to the extension request, or delayed granting the extension until they were able to advise us of the discloser's views.

Claire

2/9/20

<b>Case Ownership Changed</b>	/	Witham, Claire	8-Sep-20 9:32 AM	Witham, Claire	8-Sep-20 9:32 AM	
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Reassigned from 'Witham, Claire' to [REDACTED], Michael' by 'Witham, Claire'

<b>Briefing</b>	/	[REDACTED]	22-Sep-20 9:31 AM	[REDACTED] Michael	8-Sep-20 10:53 AM	0
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Hi Micahel

Here is the service complaint that we discussed this morning. Please review and progress.

thanks

Claire

8/9/20

<b>New Incoming Document Attached</b>	/	[REDACTED] Michael	11-Sep-20 11:55 AM	[REDACTED], Michael	11-Sep-20 6:35 AM	0
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20200910 EMail 01.msg 3. Email to Director from discloser seeking statement under ADJR Act

<b>New Incoming Document Attached</b>	/	[REDACTED] Michael	11-Sep-20 11:57 AM	[REDACTED], Michael	11-Sep-20 6:35 AM	0
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20200910 EMail 02.msg 4. Second email from discloser requesting statement under ADJR Act

<b>Request Internal Advice</b>	/	[REDACTED] Michael	18-Sep-20 6:34 AM	[REDACTED] Michael	11-Sep-20 7:02 AM	Internal advice provided	0
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Copy of internal request

<b>Internal advice complete</b>	/	[REDACTED] Michael	18-Sep-20 7:03 AM	[REDACTED], Michael	11-Sep-20 7:03 AM	0
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**Assessment** / [REDACTED], 9-Sep-20 [REDACTED], Michael 11-Sep-20 0  
 Michael 10:53 AM [REDACTED] 10:40 AM

Any response to the C for the time-being should deal with unresolved OCO service delivery matters only, and not deal with the investigation, to date, by the Australian Public Service Commission, although the Complainant will be free to complain to the Ombudsman about the APSC's investigation after completing all formalities with it including first complaining to the APSC.

The role of the Ombudsman is to investigate action, being action that relates to a matter of administration, by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman. Section 15 of the Public Governance, Performance and Accountability Act 2013 (PGPA Act) places requirements on all accountable authorities about how the authority governs their entity; including managing their entity in a way that promotes the financial sustainability of their entity and the proper use and management of public resources. Therefore, it is the role of the agency to deploy its staff as it sees fit and the Ombudsman has now power to direct how an agency applies its resources.

In the circumstances, in investigating a service delivery complaint, I do not intend to address issues that call for conjecture or opinion the actions of individual members of the Ombudsman's staff, nor do I propose to give legal advice nor query the running of the internal economy of the agency referred to.

Section 52 of the PID Act provides for agencies to complete an investigation of a public interest disclosure, including preparing the investigation report (see 7.3.3.1 of the Agency Guide guide) within 90 days of allocation. The Ombudsman (or the IGIS in the case of intelligence agencies) can grant extensions of time either on request from a discloser or agency, or, alternatively, on their own initiative. In most cases, an extension is requested by the agency conducting the investigation.

In this case it appears that the agency estimated that it would exceed 90 days in investigating the matter. There is no explanation for that early decision and it would be a matter worth pursuing as a systemic issue.

The C has expended significant energy in protesting the agency's disregard for its own policy. Is has possibly been cavalier to an extent because it has disregarded its own policies in dealing with consultation in dealing with how long the matter would take.

Mr Anon is correct to say that he is entitled to a so-caller 'legitimate expectation' that the agency would consult him on delay in an investigation because it would not be following a procedure of which it has notified the public in its Guide to Public Interest Disclosures.

However, that expectation that the agency would consult does not constitute a procedural right which would necessarily render invalid a decision made after a non-compliance with the legitimate expectation (see *Country Energy v Williams*; *Williams v Director-General National Parks and Wildlife* [2005] NSWCA 318 Per Basten JA (Spigelman CJ and Giles JA agreeing) at [95]).

The Ombudsman may take into account the views of complainants on agency delays and this is provided for in paragraph 9.1.4 of the Agency Guide. However, the Ombudsman cannot create a legal obligation for the agency to consult the complainant because there is no source of statutory power to imposed the condition.

Except in cases where special circumstances exist, it is not appropriate to investigate complaints against the APSC or any other agency until the agency has had the opportunity to address them. This position is consistent with 6 of the Ombudsman Act 1976.



In *Jess v Scott* (1986) 12 FCR 187, a case involving an application to extend time in which to file a notice of appeal, in which the Full Court discussed a number of decisions concerning the terms "special circumstances" and "special reasons". These terms were treated as having essentially the same meaning.

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The Court said that "special reasons":

...is an expression describing a flexible discretionary power, but one requiring a case to be made upon grounds sufficient to justify a departure, in the particular circumstances, from the ordinary rule ...

We might inquire about special circumstances that would lead us to investigate.



<b>New Incoming Document Attached</b>	/		14-Sep-20		Michael	11-Sep-20	0
		Michael	10:20 AM			10:40 AM	

20200911 EMail 05. Further complaint about timeliness and information flow.

<b>New Incoming Document Attached</b>	/		11-Sep-20		Michael	11-Sep-20	0
		Michael	4:06 PM			10:40 AM	



<b>Briefing</b>	/	Witham, Claire	25-Sep-20	Witham, Claire	14-Sep-20	0
			10:16 AM		4:34 PM	



Please read and comment on outgoing 06 which is the paper from which I propose to draw down the Service Delivery response. The reference material will be removed and it will be shortened somewhat.

<b>New Incoming Document Attached</b>	/		17-Sep-20		Michael	16-Sep-20	0
		Michael	6:11 AM			6:14 AM	



20200916 EMail 02.msg 06. From C re outgoing 07 and 08 issue os classification and s 8 raised. Say not service delivery.



20200916 EMail 01.msg 07. From C re outgoing 07 and 08 issue os classification and s 8 raised. Say not service delivery.

<b>Write to Caller</b>	/		29-Sep-20		Michael	22-Sep-20	0
		Michael	12:02 PM			12:02 PM	

<b>New Incoming Document Attached</b>	/		2-Nov-20		Michael	30-Oct-20	0
		Michael	12:50 PM			12:55 PM	

20201030 EMail 01.msg 08. C's FOI request related to 9 August 2020 complaint.

<b>New Incoming Document Attached</b>	/		2-Nov-20		Michael	30-Oct-20	0
		Michael	12:53 PM			1:20 PM	

<b>Research</b>	/		3-Nov-20		Michael	3-Nov-20	0
		Michael	1:53 PM			8:13 AM	

Hi Michael

The service complaint has been incorrectly cross referenced to the PID Investigation Elizabeth recently handled regarding the APSC. It is not the disclosure or investigation that this anonymous discloser is

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referring to. This discloser's PID related to the Federal Court and is in Resolve as PID-2020-400006. This case will give you the timeframe, chronology along with the service delivery complaint case.

PID-2020-400006 is also incorrectly cross referenced to the PID investigation Elizabeth conducted (PID-2020-100004).

I don't think there has been a breach of privacy or any error in our correspondence with the anonymous discloser p301175402j.

Can you check your work and prepare new dot points please.

thanks

Claire

2/11/20

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Dear Claire

Here is a time line that indicates we wrote to the Discloser on 7 August 2020 as we had misidentified him as the Discloser for another PID. The service delivery problems appear to stem from that misidentification. Apart from possible privacy issues, I think we can reasonably write to the Discloser and apologise for the inconvenience and close the matter.

Timeline

The Australian Public Service Commission received the public interest disclosure (PID) under the Public Interest Disclosure Act 2013 (PID Act) on 30 May 2020.

The disclosure includes allegations about both the Australian Public Service Commissioner and the Commission's General Counsel.

The discloser alleged that the APSC's General Counsel inappropriately used an 'OFFICIAL: Sensitive Legal Privilege' dissemination limiting marker when emailing the operators of the 'Right to Know' website to request that the names of APSC employees be removed from correspondence published on the website. In the APSC's view, the published correspondence contained potentially defamatory material.

The discloser further alleged that the General Counsel acted with an intent to intimidate — insofar as the email sent to 'Right to Know' may be construed as a legal threat of litigation — and that this was done with the awareness and authorisation of the Commissioner. The allegations appear to be disclosable conduct for the purposes of the PID Act because the alleged conduct could, if proved, give reasonable grounds for disciplinary action against the Australian Public Service Commissioner and/or the Commission's General Counsel (paragraph 29(2)(b) of the PID Act). The Australian Public Service Commission (APSC) Authorised Officer (AO) therefore assessed as the allegations involve the Australian Public Service Commissioner, it would be inappropriate to allocate the disclosure to the Commission for handling and suggested that in the circumstances, it appears that the OCO would be the most appropriate agency to allocate this disclosure for handling.

On 11 May 2020 this Office allocated the discloser's public interest disclosure (PID) to the Australian Public Service Commissioner (APSC) under the Public Interest Disclosure Act 2013 (PID Act).

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On 26 June 2020, the APSC allocated your disclosure to the OCO under the PID Act.

On 17 July 2020 this Office advised the Discloser that we had taken the case for action.

The Ombudsman endorsed the investigation report on 21 September 2020 and on this basis the investigation report was considered prepared/completed as of that date.

Ombudsman advised further actions required before investigation is completed. These were:

the APSC to be provided with the opportunity to comment on our observations about the use of the DLMs prior to the report being completed

the respondent (APSC GC) to be provided with the opportunity to make comments, drawing

the discloser to be advised that the OCO is seeking an extension of time and ask for any comments on us doing so

The Discloser advised us that:

PID-N-2020-30005 is NOT this PID. This PID is 2020-100004

PID-N-2020-30005 is PID PID-2020-400006

In the circumstances I consider that we have sent correspondence to the wrong person and breached privacy.



On 1 October 2020 this Office advised the discloser that further to the letter sent on 10 September 2020, regarding an extension of time for our Office to investigate the PID, the OCO will need to seek a second extension. The current due date was 9 October 2020, and OCO was now aiming to complete the investigation by 6 November 2020.

On 6 October 2020 we sent documents for comment to the APSC.

On 13 October 2020 the respondent replied that she had no comments to make on the draft report.

On 20 October 2020 we sent a final report to the Discloser.

On 21 October 2020 the APSC Commissioner responded to the OCO agreeing to the content of the OCO report.

<b>Research</b>	/		4-Nov-20		Michael	3-Nov-20	0
		Michael	12:58 PM			8:20 AM	

FOI Request. C requests the following information:

2-1 request access to each entry made in Resolve from 9 August 2020 to 30 September 2020.

2-2 request a copy of notice issued pursuant to s 8(1) of the Ombudsman Act 1976.

2-3 request a copy of an investigation plan raised pursuant to s 8(2) of the Ombudsman Act 1976.

2-4 request a copy of monthly updates to managers.

2-5 request a copy of the Office's internal PID procedures.

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<b>Research</b>	/	Witham, Claire	4-Nov-20 8:14 AM	Witham, Claire	5-Nov-20 4:42 PM	0
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Hello Claire

Here is the history of the FCA matter and going to the Service Complaint:

On 23 March 2020 the Discloser made a public interest disclosure (PID) under the Public Interest Disclosure Act 2013 (PID Act).

The disclosure is about the conduct of public officials, members of the staff of the Federal Court of Australia, and a 'pattern of patronage and favouritism' resulting in promotions and appointments without merit and conduct intended to mislead or deceive judges of that Court.

The Discloser sought to have the Commonwealth Ombudsman receive the PID for referral to the APSC due to the limitation on what agencies may receive internal disclosures in s 34 of the PID Act.

On 2 April 2020 the Discloser asked for details of the Ombudsman's Authorised Officer's (AO) intended date of decision under s 43 of the PID Act.

17 April 2020 OCO discussed the relevance of the PID with APSC for an investigation under its powers (to which the APSC answered 'no') or under the PID Act.

On 1 May 2020 the IO advised the Discloser that she had completed her assessment (s 26(c)) and had decided to allocate the matter to the APSC subject to APSC consent (s 43(6)).

On 7 May 2020 the APSC agreed to the allocation.

On 11 May 2020 the OCO send an allocation letter to the APSC (s 44(1)) and to the Discloser. This set 9 August 2020 as the statutory date of completion of the investigation (s 52(2)).

On 29 July 2020 the APSC sought an extension of time under s 52 as the APSC had been experiencing a large increase in workload due to the COVID-19 response, the disclosure involves a particularly large volume of documents, 897 pages, which has taken some time to consider amongst other high priority work and having done so, it wished to consult with the Federal Court and develop a forward plan.

There is no evidence that the APSC consulted the Discloser at that time. That would not be in accordance with the non-binding recommendation in paragraph 7.5.1 of the Agency Guide to Public Interest Disclosure (the Guide).

The Ombudsman does not have a policy of consulting Disclosers. There is no statutory provision requiring consultation, only a post facto requirement for the OCO to inform the Discloser of it (s 52(4)(a)), .

The Guide at paragraph 9.1.4 provides that the Ombudsman will not automatically grant an application for an extension ... The Ombudsman will also take into account any views expressed by the discloser about the requested extension. In this case those views would have had to be provided by the APSC as requested in our extension form and we queried the absence of information prior to making a decision.

On 7 August 2020 the Ombudsman granted the request and specified a new due date of 9 November 2020.

On 9 August 2020 the Discloser made a Service Complaint to this Office.

We made several attempts to defer an immediate answer and in doing so may have caused him

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inconvenience.

On 22 September 2020 the Office responded that the Discloser's concerns about our handling of granting the extension are noted, but we found that Mr Davis did not make any errors in how he handled the APSC's request. We note that he made contact with the agency regarding the comments made in relation to the discloser's views on the extension request form. We noted further that we could have sought more information on what was said by the agency in relation to its request for an extension, or delayed granting the extension until the agency was able to advise us of the discloser's views, but the decision to grant the extension was still likely on the basis of the reasons provided by the agency and so that the integrity of the PID investigation was maintained. We advised the Discloser that as a result of his experience, we are considering how we may make consultation on extensions of time a requirement rather than simple guidance.



On 27 October 2020, we received aextensionquest from the Discloser seeking details of the Service Complaint matter.

On 29 October 2020 the APSC sought a further 180 day extension.

On 30 October 2020 we wrote to the APSC and noted that it had undertaken to advise our Office of any views expressed by the discloser, having advised them yesterday of the APSC's intention to seek additional time.

On 30 October 2020 we deferred making a decision on the extension request until after COB Wednesday 4 November, to allow the discloser a reasonable period of time to respond to the APSC.

On 2 November 2020 the Discloser wrote to the Ombudsman with a personal appeal about the APSC request for a further extension.

<b>Case Closure</b>	/		9-Nov-20	 , Michael	6-Nov-20	0
		Michael	12:34 PM		12:34 PM	

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**Officer**

Office:Canberra

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**External References**

<b>Filename</b>	<b>Comments</b>
20200813 EMail 01.msg	1. Email from p301175402j with service complaint about OBO granting an extension to APSC
20200813 EMail 02.msg	1. Email to discloser advising receipt of service complaint
20200818 EMail 01.msg	2. Email from discloser regarding timeframe for service complaint
20200818 EMail 02.msg	2. Email to discloser re timeframe for service complaint and information provided about PID handling complaints.
20200910 EMail 01.msg	3. Email to Director from discloser seeking statement under ADJR Act
20200910 EMail 02.msg	4. Second email from discloser requesting statement under ADJR Act
20200910 EMail 03.msg	3. Email to Legal Director seeking advice re ADJR Act request
20200910 EMail 04.msg	4. Email to Legal Director re timeframe for legal advice
20200910 EMail 06.msg	5. Email to discloser acknowledging receipt of two emails on 9 Sept 20
Service delivery analysis.docx	06. Analysis (Deliberative document)
20200911 EMail 01.msg	05. Further complaint about timeliness and information flow.
20200911 EMail 02.msg	07. Email to C re service Delivery response due.

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20200911 EMail 03.msg 08. Unofficial version of 07 to C. It was thought "Official" marking would not get through to C.

20200916 EMail 02.msg 06. From C re outgoing 07 and 08 issue os classification and s 8 raised. Say not service delivery.

20200916 EMail 01.msg 07. From C re outgoing 07 and 08 issue os classification and s 8 raised. Say not service delivery.

20200922 EMail 01.msg 09. Service delivery closure

20200930 EMail 01.msg 10. Internal copy ADJR reasons

20200930 EMail 02.msg 11. ADJR Reasons to C

20201030 EMail 01.msg 08. C's FOI request related to 9 August 2020 complaint.

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**Cross References****Case****Comments**

FOI-2020-10074

2020-102233

PID-2020-400006

2021-500963

2021-104592

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**Additional Agency**

Section ADD\_AGENCY either doesnt exist or has no data or detail area properly defined

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**Closure Details**

Closed On: 6-Nov-20 12:34 PM

Closed By:  Michael

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**Security Level**

50